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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1987

ROSE GRASTY; PAT POORE, and BARBARA SCULLEN, on behalf of themselves and all others similarly situated,
Petitioners

v.

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, MID-ATLANTIC REGIONAL JOINT BOARD OF TEXTILE WORKERS UNION OF AMERICA, and PHILADELPHIA JOINT BOARD OF TEXTILE WORKERS UNION OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a class action on behalf of the members of a bargaining unit against their international and intermediate unions for breach of their respective constitutions is subject to the six month statute of limitations contained in Section 10(b) of the National Labor Relations Act. 29 U.S.C. Section 160(b).

PARTIES

Petitioners are Rose Grasty, Pat Poore and Barbara Scullen, employees at Down's Carpet Company in Willow Grove, Pennsylvania and members of a bargaining unit represented by Local 80 of the Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC.

Respondents, Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC, Mid-Atlantic Regional Joint Board of Textile Workers Union of America, and Philadelphia Joint Board of Textile Workers Union of America are, respectively, an international union founded to organize and collectively bargain for workers employed in the textile and related industries and two of its affiliated intermediate unions.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported as of the date this petition was prepared and is reproduced at pages A-1–A-22 of the appendix hereto. The opinion of the district court was not reported and is reproduced at pages A-23–A-28 of the appendix.

JURISDICTION

The opinion of the Court of Appeals was rendered on August 31, 1987 and this petition is filed within sixty days of that time. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. Section 185, which provides as follows:

> (1) Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners are employees of Down's Carpet Company, a manufacturer of high-quality carpeting located in Willow Grove, Pennsylvania and members of a bargaining unit represented by Local 80 of the Amalgamated Clothing & Textile Workers Union, AFL-CIO ("ACTWU").

The ACTWU is an international union founded to organize and collectively bargain on behalf of workers employed in the textile and related industries. Article VII of its constitution obligates every member to join a local; each local to affiliate with an intermediate union known as a joint board — here, Local 80 and the Mid-Atlantic Regional Joint Board ("the Joint Board"); and the joint boards to "unite, organize and coordinate the activities and affairs of affiliated local unions." Conversely, the

Joint Board has exclusive authority to call and conduct strikes by Local 80 and execute collective bargaining agreements on behalf of its membership, Id., Art. VI; the collective bargaining agreement executed by the Joint Board with Down's gave the Joint Board exclusive authority to arbitrate grievances on behalf of employees; and the Joint Board has exclusive authority to call and conduct meetings and elections by Local 80 and to administer its finances.

In short, respondents' constitutions obligate respondents to supply, and affiliated local unions and their membership to purchase, respondents' services for organizational and collective bargaining purposes. All of the approximately $13.00 in monthly dues collected by the ACTWU from each member of Local 80 during the relevant time period was retained by respondents to fund their activities; the sole exception being rebates of $.15 per member to fund Local 80 and $.25 per member to fund the activities of the Down's Carpet Company Shop Association.

The gravamen of the complaint is that petitioners and their coworkers, while paying in excess of $50,000 for respondents' services during the period February 1, 1983 — January 31, 1986, received none. Respondents serve affiliated locals through salaried employees known as "joint board representatives" — in this case, Jacquline Lupo ("Lupo"). During the relevant time period, respondents in general and Lupo in particular completely abdicated their responsibilities to Local 80. First, when the Down's Carpet Company bargaining unit voted to reject a contract proposal and continue striking in February, 1983, Lupo unilaterally terminated the strike by personally retabulating the vote as favoring ratification and then refusing to revote the issues, recount the ballots or even to produce the ballots for inspection. Thereafter, Lupo uniformly refused and failed to press employee grievances — including five discharge grievances and a plant wide grievance over an increase in

payroll deductions for medical insurance. Similarly, Lupo failed to conduct a single election by Local 80 as a result of which it lacked officers and was essentially defunct.

At the same time, Lupo took over Local 80's finances, concealed its books from its membership, withheld or misappropriated the $.25 in Shop rebates, caused Down's to deduct "double dues" from employees returning from health-related absences in order to "make-up" for missed dues in violation of respondents' policies, and utilized Local funds for trips.

Petitioners and their coworkers continuously sought and received assurances from the ACTWU and the Joint Board of redress for Lupo's performance. In the spring of 1986, fed up with the lack of action, the bargaining unit met and elected to institute this action. (As of the time of this action, Local 80 and the bargaining unit are identical).

In September, 1985, petitioners filed their complaint in the United States District Court for the Eastern District of Pennsylvania, on behalf of themselves and a class consisting of every member of the bargaining unit during the relevant time period, seeking, inter alia, a refund of their dues, damages for wages reduced or lost by the settlement of the 1983 strike and the failure to grieve discharges, and an accounting and payment of the missing Shop rebates.

By Order and Opinion dated May 30, 1986, the district court, by the Hon. Clarence C. Newcomer, denied class certification on the grounds that petitioners, Grasty and Poore, had interests potentially adverse to the class. By Order dated June 15, 1986 and Opinion dated August 9, 1986, the district court entered summary judgment on petitioners' individual claims on the grounds they were barred by a six month statute of limitations.

By Order and Opinion dated August 31, 1987, the Third Circuit reversed and remanded. It held the district

court abused its discretion by denying class certification without regard to whether petitioner Scullen was an adequate class representative. On the limitations issue, it held claims which were not "intertwined with the day to day relationship between management and labor" (double dues deductions and missing rebates) governed by the Pennsylvania statute of limitations on contract actions; and the remaining claims (relating to the strike, grievances and organization of Local 80) governed by a six month statute of limitations. The Court of Appeals further held that factual tolling issues nevertheless precluded summary judgment on these claims.

The Court of Appeals' ruling, while putting petitioners "back in court," nevertheless places a severe impediment in the way of a recovery by petitioners and the class on the bulk of their claims. For this reason, and those set forth below, petitioners seek certiorari on the question of whether a six month statute of limitations should be applied in a class action on behalf of the membership of a local union against its affiliated international for breach of the latter's constitution.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

The Court of Appeals' holding is an unprincipled and unworkable limitation on the rights of local unions and their membership under union constitutions. It contravenes the policies underlying Section 301, constitutes an indiscriminate extension of this Court's holding in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and conflicts decisions by other courts of appeal.

I.
THE COURT OF APPEALS' HOLDING CONTRAVENES THE POLICIES UNDERLYING SECTION 301

This Court has recognized that, in enacting Section 301, "Congress was . . . concerned that unions be made

legally accountable for agreements into which they entered among themselves," *United Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada v. Local 334*, 452 U.S. 615, 623-4 (1981), and has further held:

> "Once the parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board. H.R. Conf.Rep.No.510, 80th Cong., 1st Sess., 42 (1947) (other citations omitted) Similarly, Congress chose in Section 301(a) to have contracts between labor organizations enforced in federal court." Id. at 626.

The *Journeymen* case arose out of a jurisdictional dispute between an international union and one of its locals, but its reasoning surely applies here. It would be anamolous if a statute intended to render unions "legally accountable for their agreements" did not afford local unions or their membership the right to sue their international for failing to organize or represent them in accordance with the terms of its constitution. Indeed, the Court of Appeals expressly held that this case properly arose under Section 301. Appendix, p. A-6–A-8.

It is equally anamolous to subject the right to the six month statute of limitations contained in Section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. Section 160(b) — as opposed to the forum state statute of limitations for contract action ordinarily applied in Section 301 cases. *International Union, United Automobile, Aerospace & Agricultural Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). By so doing, the Court of Appeals construed a statute designed to expand rights under the federal labor laws so as to destroy those rights.

II.
THE COURT OF APPEALS' HOLDING MISREADS AND MISAPPLIES THIS COURT'S DECISION IN DelCOSTELLO v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, 462 U.S. 151 (1983).

The Court of Appeals reasoned that *DelCostello* applied that because petitioner's claims "are related to the Unions' role as exclusive bargaining representatives" and "the acts on which the claims are based . . . are identical to acts which would support a claim for the Union's duty of fair representation." Appendix, p. A-17. The Third Circuit's broad reading of *DelCostello* in fact disregards the language and rationale of that case, and has resulted, both here and in other cases, in an indiscriminate, unworkable and unfair extension of *DelCostello*.

First, *DelCostello* involved a "hybrid suit" by an employee against his employer for violating a collective bargaining agreement and union for breach of its duty of fair representation in connection with grievance proceedings under the collective bargaining agreement.[1] It opted for application of the NLRA six month statute of limitations — rather than the state law contract of statute of limitations — as a means of reconciling the

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1. The Court had previously addressed this issue in *United Parcel Service v. Mitchell*, 41 U.S. 56 (1981); there holding that hybrid actions, as a "a direct challenge to the private settlement of disputes under collective bargaining agreements," Id. at 66, ought to be subject to the state law limitations period for suits challenging arbitration awards as opposed to suits to enforce contracts, so as to balance "the national interest in stable bargaining relationships and the finality of private settlements," Id. at 70. *DelCostello* modified *Mitchell*, holding the NLRA six month limitations period more appropriate in view of its greater length and the "family resemblance" between a claim for breach of the duty of fair representation under Section 9 of the NLRA and an unfair labor practice under Section 8 of the NLRA.

federal labor policy favoring Section 301 suits by individual employees — see, *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), with that favoring the private resolution of disputes under collective bargaining agreements. See, *Republic Steel Corp. v. Maddox*, 391 U.S. 650 (1965). In contradistinction, this case is not a "hybrid suit"; it does not challenge a grievance procedure established by a collective bargaining agreement or, for that matter, respondents' constitutions.

Secondly, the Court of Appeals' broad reading of *DelCostello* simply wreaks havoc with the overall scheme of federal labor legislation. By its reasoning, the NLRA statute of limitations should apply in virtually every Section 301 suit — since all relate in some fashion to a union's "role as exclusive bargaining representative" and most involve conduct arguably within section 8 or 9 of the NLRA — in contravention of this Court' holding in *Smith v. Evening News Ass'n*, supra, that Section 301 jurisdiction is not in any way preempted or limited by the NLRA.[2]

The analysis of limitations issues under Section 301 to which the Court of Appeals' reading of *DelCostello* gives rise is unprincipled and unworkable. For instance,

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2. Whereas *DelCostello* "stress[ed] that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action in labor law," the decision below is the latest in a line of Third Circuit cases applying *DelCostello* in a variety of contexts with little or no resemblance to the hybrid action involved in *DelCostello*. See, *Local Union 1397, United Steelworkers of America v. United Steelworkers of America*, 748 F.2d 180 (3rd Cir. 1984) (suit under Section 102 of the Labor Management Reporting & Disclosure Act); *Taylor v. Ford Motor Company*, 761 F.2d 931 (3rd Cir. 1985), *cert. denied* 106 S.Ct. 849 (1986) (suit to enforce arbitration award); *Lewis v. International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of America, Local Union No. 771*, 826 F.2d 1310 (3rd Cir. 1987) (suit for failure to put union's acquiesence in employer absentee policy to vote, in violation of union constitution).

it is difficult, if not impossible, to understand the distinction drawn by the Court of Appeals for limitations purposes between petitioners' claim that respondents failed to conduct elections for Local 80 and petitioners claim that respondents caused Down's improperly to double deduct dues. Generally, every Section 301 case will implicate interests in the "stability of bargaining relationships" and the other factors which the Court of Appeals deemed controlling in determining whether to apply *DelCostello*.

Similarly, it unjustly discriminates between local unions and their members and international unions. Suits by the former would invariably be subject to the six month statute; whereas suits by the latter — e.g. by the ACTWU to compel Local 80 to turn over dues collected from its members — would just as invariably be subject to a contract action statute of limitations. Nothing in Section 301 or federal labor law and policy justifies this disparity; indeed, there is no reason why the membership of a local union should not stand on the same footing in suing the international for breach of its constitutional obligations as do shareholders in suing their corporation for breach of its articles.

III.
THE COURT OF APPEALS HOLDING CONFLICTS WITH DECISIONS OF COURTS OF APEALS FOR THE FIRST, FIFTH AND SIXTH CIRCUITS

The Court of Appeals' broad reading of *DelCostello* is in conflict with decisions by other courts of appeal declining to extend *DelCostello* beyond hybrid actions. See: *Derwin v. General Dynamics Corp.*, 719 F.2d 484 (1st Cir. 1982) (*DelCostello* does not apply to suit to enforce arbitration award); *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986) (*DelCostello* does not apply in suit under Labor Management Reporting & Disclosure Act); *Daigle v. Gulf State Utilities Co., Local No. 2286*, 794 F.2d 974

(5th Cir. 1986) (*DelCostello* does not apply to hybrid action in connection with collective bargaining agreement which did not mandate arbitration); *Champion International Corp. v. United Paperworkers International Union*, 779 F.2d 328 (6th Cir. 1985) (*DelCostello* does not apply in suit to vacate arbitration award); *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 779 F.2d 1098 (6th Cir. 1986) (*DelCostello* does not apply in suit by pension fund to collect pension contributions due from employer under collective bargaining agreement).[3]

CONCLUSION

The question presented is one which this Court recently noted, but left open for initial consideration by the Eleventh Circuit Court of Appeals, in *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, ____U.S. ____, 107 S.Ct. 2161, 2169-70 (1987). Its resolution has enormous implications, both for the claims of the petitioners and the putative class in this case and for the long term development of the Section 301 jurisprudence of union constitutions envisioned by this Court's decision in the *Journeyman* case. Moreover, it is one on which the circuit courts have split, creating a dramatic variation among the rights of local unions and their members. For these reasons, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit in this matter.

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3. Only the Eleventh Circuit is in accord with the Third Circuit's broad reading of *DelCostello*. See *Earkins v. United Steelworkers of America*, 723 F.2d 837 (11th Cir. 1984), *cert. denied* 467 U.S. 1243 (1984) (*DelCostello* applicable to breach of duty of fair representation claim not joined by Section 301 claim against employer); *Davis v. United Automobile Workers of America*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied* 106 S.Ct. 1284 (1986) (*DelCostello* applicable to claim under Labor Management Reporting & Disclosure Act).

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1642

ROSE GRASTY, PAT POORE, and BARBARA SCULLEN, on behalf of themselves and all others similarly situated,

Appellants

v.

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, MID-ATLANTIC REGIONAL JOINT BOARD OF TEXTILE WORKERS UNION OF AMERICA, PHILADELPHIA JOINT BOARD OF TEXTILE WORKERS UNION OF AMERICA, and CARPET AND RUG WORKERS OF PHILADELPHIA AND VICINITY, LOCAL 80

Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Mid-Atlantic Regional Joint Board of Textile Workers Union of America, and Philadelphia Joint Board of Textile Workers Union of America,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 85-5654)

Argued April 9, 1987

Before: SLOVITER, BECKER AND GARTH,
Circuit Judges

(Opinion filed August 31, 1987)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

This appeal involves an action by members of a local union against the regional joint board of the union and the international union claiming that defendants violated their respective constitutions and bylaws by failing to represent effectively the members of the Local in a number of respects, and that

defendants violated their constitutions and bylaws and RICO, 18 U.S.C. §§ 1962(c), by failing to rebate a share of dues to the local union and shop association and assessing dues from disabled workers. The local union was also named as a defendant originally, but plaintiffs have contended both here and in the district court that the Local was only a nominal defendant because its treasury was in the control of agents of the other defendants. It has since been dropped as a defendant. Plaintiffs also included in their complaint a claim under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 414 (LMRDA), and a pendent state law fraud claim.

The district court denied plaintiffs' motion for class certification and granted defendants summary judgment on plaintiffs' individual claims on the ground that under *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), those claims were barred by the six-month statute of limitations of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). This appeal followed.

I.

Facts

Appellants Rose Grasty, Pat Poore and Barbara Scullen, who are the named plaintiffs, are employees of Downs Carpet Company (Downs) and are members of a bargaining unit represented by Local Union 80 (Local 80), of the Amalgamated Clothing & Textile Workers Union (ACTWU). Appellee ACTWU is the international union and appellee Mid-Atlantic Regional Joint Board of Textile Workers Union of America (Joint Board) is the intermediate union with jurisdiction over Local 80.[1] (Unless otherwise noted, appellees are collectively

1. The complaint also named the Philadelphia Joint Board of Textile Workers Union of America as a defendant. It was averred in

referred to as "the Unions").

Plaintiffs allege that through a variety of actions or inactions, the Unions failed to fairly and faithfully represent them and other members of a class consisting of members of the bargaining unit. Their claims are based primarily upon the manner in which Jacqueline Lupo discharged her responsibilities as representative of the Joint Board to Local 80.

Plaintiffs allege that the Unions, acting through Lupo, broke a strike in February 1983 by fraudulently engineering the ratification of a bargaining agreement between Local 80 and Downs. According to the complaint, the agreement was rejected by a vote of 59 to 52 taken on February 15, 1983 which was tabulated by a committee of the members of the bargaining unit. Three days later, Lupo called the negotiation and election committees to a meeting and informed them that the ballots had been recounted and that the vote was 51 to 49 to accept Downs' proposal. Plaintiffs contend that "Lupo did not want to administer and conduct the strike and fabricated the 'recount' to that end." Appellant's Brief at 10.

Plaintiffs also allege that the Unions, again acting primarily through Lupo, allowed Local 80 to "fall into chaos" and failed and refused to conduct elections and other procedures to maintain Local 80 as a viable organization; that the Unions failed and refused to provide them and other members of the bargaining

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the answer of the Mid-Atlantic Regional Joint Board and Local 80 that the Philadelphia Joint Board no longer exists as an entity. App. at 18. This averment was apparently not challenged by appellants and the district court treated only the Mid-Atlantic Regional Joint Board as a defendant. *See* App. at 230. The Philadelphia Joint Board was apparently merged into the Mid-Atlantic Regional Joint Board. We refer to both the Philadelphia Joint Board and the Mid-Atlantic Regional Joint Board as the "Joint Board."

unit with effective representation in their day-to-day relationship with Downs by failing to handle worker grievances or disputes which occur on the second shift, by refusing to press grievances of terminated workers, and by refusing to protest when the company unilaterally doubled the deduction from employee wages for medical insurance from $.05 per hour to $.10 per hour; that the Unions collected excessive dues by assessing dues when bargaining unit members were disabled and not working and then causing Downs to deduct the extra dues from the members' wages when they returned to work; and that the Unions failed and refused to supply bargaining unit members with copies of the bargaining agreement and copies of their respective constitutions.

Finally, plaintiffs claim that the Unions failed for the five-year period prior to the filing of the complaint to rebate to the Downs shop association the $.25 per employee per month for its use as was required by their respective constitutions and bylaws. The complaint also alleges that the failure to rebate dues and the assessment of dues from employees who were disabled were part of a pattern of racketeering activity conducted in violation of RICO.

In a Memorandum Opinion and Order of May 30, 1986, the district court denied class certification on the ground that appellants Grasty and Poore cannot adequately represent the interests of the class since they were officers of Local 80, a defendant, during the relevant period. App. at 236-37. On June 2, 1986, the day scheduled for trial, the district court informed the parties that it would grant the Unions' motion for summary judgment in certain respects and deny it in others.[2] Plaintiffs then informed the district court that

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2. It is unclear from the record before us on which claims summary judgment would have been denied or granted. It appears from the district court's opinion that summary judgment was

the remaining factual allegations of misconduct did not apply to their individual claims absent the possibility of class recovery. On July 31, 1986, the district court issued an order granting the Unions' motion for summary judgment. By Memorandum Opinion of August 9, 1986 the district court held that "all claims not waived by the individual plaintiffs, which the plaintiffs claim to have affected them personally, are barred by the statute of limitations." App. at 242.

On August 15, 1986 plaintiffs moved for reconsideration of the district court's order granting summary judgment. That motion was denied on September 12, 1986. Plaintiffs appeal from the district court's orders denying class certification, granting summary judgment in favor of the Unions, denying reconsideration of the order granting summary judgment, and various procedural orders.

II.

Jurisdiction

In this appeal, as in that recently decided in *Lewis v. International Bhd. of Teamsters*, No. 86-1644, slip op. at 5-12 (August 21, 1987), we are obliged to satisfy ourselves of our jurisdiction and that of the district court since federal subject matter jurisdiction over all the claims is not immediately apparent from the face of the complaint.[3] We cannot use the RICO count to

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originally granted on Count I, the Count asserting that defendants breached their duty of fair representation arising from the union constitutions. Counts II through V pertained to the double deduction of dues and failure to rebate claims, and the LMRDA, RICO and common law fraud claims.

3. By letter dated April 3, 1987, this court requested counsel to be prepared to address "the question of whether federal subject matter jurisdiction exists where individual members of the union

support pendent jurisdiction over the remaining counts because the failure to rebate dues, the essence of the RICO claim, does not appear to be based on operative facts common to the other claims. For the same reason the LMRDA claim alleging failure to provide copies of the Unions' constitutions and the bargaining agreement will not support jurisdiction over the remaining counts. Accordingly, if we are to accept plaintiffs' counsel's vigorous assertion that he is not alleging that the Unions breached their duty of fair representation, in the face of what appears to us to be several such allegations in the complaint,[4] we are required to decide whether plaintiffs' claim of a violation of the Unions' constitutions evokes federal jurisdiction under section 301(a) of the Labor Management Relations Act.

Our decision in *Lewis* is controlling. In that case we held that jurisdiction exists under section 301(a) over a claim by an individual union member for breach of the international union's constitution. In this case, plaintiffs allege breach of the constitutions of the international union and the governing joint board.

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have sued their union for breach of the union constitution." Post-argument memoranda addressing the issue were filed.

4. On its face, the complaint raises allegations of breach of the duty of fair representation. For example, para. 11(B) lists as one of the issues of fact and law common to the class "[w]hether said conduct was in breach of a duty of fair representation incumbent upon defendants pursuant to the Agreement, preceding collective bargaining agreements, and defendants' respective constitutions and bylaws," App. at 8, and para. 27 states, "At all times relevant hereto, each defendant owed plaintiffs and each member of the class a duty of fair representation pursuant to the Agreement." App. at 13. Of course, plaintiffs are free to drop allegations of their complaint and plaintiffs' counsel may have receded from these allegations in the belief that it would inure to plaintiffs' advantage in responding to the statute of limitations defense. As we point out in the text, *infra*, that argument is unavailing.

Accordingly, we conclude that, regardless of how the remaining claims are characterized, the district court had jurisdiction over them pursuant to section 301(a).[5]

III.

Class Certification

The principal issue before us on this appeal is whether the district court abused its discretion in denying certification of the class. Rule 23(a) of the Federal Rules of Civil Procedure permits one or more members of a class to sue on behalf of all members of the class "only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." The district court held that plaintiffs satisfied all but the last of these requirements. The district court concluded that the named plaintiffs cannot adequately represent the interests of the class because plaintiffs Grasty and Poore had held offices with Local 80 during the relevant period, and there was "potential for conflict with the proposed class." App. at 236-37.

Before deciding whether that conclusion can be sustained, we must consider the effect of the district

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5. In light of our acceptance *arguendo* of plaintiffs' view that the complaint does not include a breach of a duty of fair representation claim, we need not consider whether such a claim may be pursued independent of a claim against the employer alleging violation of the collective bargaining agreement. That issue is now before this court in banc in Bygott v. Leaseway Transp. Co., Nos. 86-1027 and 86-1456, pursuant to an Order dated July 27, 1987 signed by Chief Judge Gibbons vacating the panel opinion and the judgment thereon and listing the case for rehearing before the court in banc.

court's failure to make any determination concerning the adequacy of Scullen, the third plaintiff, as a class representative. It is not necessary that all of the named representatives meet the Rule 23(a)(4) requirement. We agree with the courts that have held that in most cases as long as one of the representatives is adequate, the adequacy of representation requirement is met. *See McCarther v. Camelot Inn of Little Rock*, 513 F. Supp. 343, 345-47 (E.D. Ark. 1980); *Elliott v. Sperry Rand Corp.*, 79 F.R.D. 580, 584 (D. Minn. 1978); *see also*, 7A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1765 at 277 (2d ed. 1986); 1 H. Newberg, *Newberg on Class Actions* § 3.27 at 209-11 (2d ed. 1985) (one plaintiff satisfies adequacy of representation requirement).

Defendants did not suggest before us, and as far as we know did not argue in the district court, that Scullen was an inadequate representative. Thus, it was an abuse of discretion for the district court to have denied class certification without first making a determination as to whether Scullen was an adequate class representative, and we are required to remand in order that the district court may make such a determination.

Plaintiffs object to the district court's conclusion that Grasty and Poore do not meet the Rule 23(a)(4) requirement for class representatives. Since that issue may arise on remand, we will review that determination as well.

The district court correctly recognized that one of the two principal factors in determining the adequacy of representation is whether there is any potential conflict of interest between the named plaintiffs and the proposed class. *See Goodman v. Lukens Steel Co.*, 777 F.2d 113, 123 (3d Cir. 1985), *aff'd on other grounds*, ___ U.S. ___, 107 S. Ct. 2617 (1987); *Scott v. University of Delaware*, 601 F.2d 76, 85-88 (3d

Cir.), *cert. denied*, 444 U.S. 931 (1979). The district court, focusing upon the fact that Grasty and Poore held offices with Local 80 during the relevant period, concluded:

> As officers of the very local the conduct of which is called into question, Grasty and Poore have a potential for conflict with the proposed class. Grasty and Poore could have an interest in foreclosing investigation into certain aspects of their conduct on behalf of Local 80 at least potentially indicative of the violations alleged in the complaint, or of the breach of fiduciary duty to the membership.

App. at 236.

In considering the ability of Poore and Grasty to represent the class, we examine first their positions at the dates in issue. Although there is some dispute as to whether Grasty, who was elected President of Local 80 in February 1986, succeeded to that office before that date from her position as Vice-President,[6] she was concededly an officer of Local 80 as well as Local 80's delegate to the Joint Board during part of the period the events complained about in this action took place. App. at 262. She apparently also was an Executive Board member of the Philadelphia Joint Board. App. at 407-08. *See* note 1, *supra*.

At her deposition, Grasty testified that she was a member of the Joint Board when a decision was made not to rebate dues to Local 80 for a period of time. App. at 385-86. Similarly, she was an officer of Local 80 at a time when plaintiffs claim the Local was "in chaos." We do not suggest that Grasty had complicity in the

6. The prior President apparently resigned during the period Grasty was Vice-President. App. at 263. Art. VIII, § 4 of the ACTWU constitution provides that the Vice-President succeeds to the office of President if the President resigns. App. at 637.

wrongful acts alleged or was responsible for them, but we cannot say that the district court abused its discretion in concluding that Grasty may have interests in conflict with those of the class.

Poore's position is different. Poore testified that prior to her election as Secretary-Treasurer of Local 80 in February 1986 she never held a position as an officer in Local 80, on the Joint Board, or any position with the International. App. at 439-40. Her only positions as an officer during the relevant time were as Vice-Chairman and as Secretary-Treasurer of the shop association. Since no allegations of misconduct by the shop association are made, her positions with the shop association would not create a conflict affecting her ability to represent the class.

Defendants argue that there is a conflict if Poore is a class representative suing Local 80 at the same time that she serves as one of its officers, which she now does. At the time the district court denied class certification, Local 80 was a defendant. Thereafter it granted plaintiffs' motion to dismiss Local 80 as a defendant. App. at 239. Since we are remanding so that the district court can consider whether Scullen is an adequate representative, it will also be free to consider whether the deletion of Local 80 as a defendant affects Poore's ability to serve as a class representative.

The other significant factor in the adequacy of representation determination is, as the district court stated, "an assurance of vigorous prosecution." App. at 235. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). This ordinarily is equated with the competence and experience of class counsel. *See, e.g., General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 263

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(3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). "Vigorous prosecution" must be measured in terms of the efficiency and legal acuity of the class representative rather than the number or length of papers filed. In slang parlance, what is needed is light rather than heat.

The district court stated that it had "considerable doubt about [plaintiffs' counsel's] ability to prosecute this action on behalf of the class." App. at 237. However, it made no finding that counsel cannot effectively represent the interests of the class. The bases given for the district court's "doubt" were the choice of the three named plaintiffs and counsel's failure to respond timely to the motion for summary judgment. Our decision that at least one of the named plaintiffs does not appear to have been an inappropriate choice as class representative undercuts the district court's reliance on that consideration as a basis for a determination that counsel was inadequate. We are not in a position, in the absence of a specific finding by the district court of inadequacy of counsel, to decide whether counsel's failure to file a timely response to the motion for summary judgment could support such a finding. We do not preclude the district court from evaluating counsel's performance as part of its determination on remand as to whether plaintiffs can adequately represent the class.[7] However, we would hesitate to construe Rule 23 to preclude maintenance of a valid claim as a class action based on counsel's inadequacy, if such a finding were made, if other experienced class counsel could be attracted to associate as co-counsel and bolster the class' representation.

The Unions argue that we can affirm the district

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7. In making this evaluation, the district court may consider counsel's performance on appeal as reflected in this opinion.

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court's order denying class certification on the ground that the named representatives' claims are not typical of the claims of the class. The typicality requirement of Rule 23(a)(3) "permits the court to assess whether the class representatives themselves present those common issues of law and fact that justify class treatment." *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir.), *cert. denied*, ____— U.S. ____—, 106 S. Ct. 342, 343 (1985). In determining whether the named representatives' claims are typical, a court must "inquir[e] whether 'the named plaintiffs' individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.'" *Id.* (quoting *Weiss v. York Hosp.*, 745 F.2d 786, 809 n.36 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060, (1985)).

The district court concluded:

> The putative class in the case before me suffered some damages which the named plaintiffs did not, as a result of a course of conduct which affected both the named plaintiffs and the class and affords both of them common legal bases for relief. Therefore, the named plaintiffs have established typicality as required by Rule 23(a)(3).

App. at 235.

The Unions argue that *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), requires us to find that the typicality requirement of Rule 23(a) was not met. We agree with the district court that *Falcon* is not controlling in this case. In *Falcon*, the Supreme Court rejected the Fifth Circuit's "across-the board" doctrine under which racial discrimination is by definition class discrimination. On the basis of that doctrine, the district court, without making the specific findings required under Rule 23(a), permitted

a Mexican-American who had not been promoted to represent a class of Mexican-Americans who had not been hired. The Court held that "it was error for the District Court *to presume* that respondent's claim was typical of other claims against [the company] by Mexican-American employees and applicants." *Id.* at 158-59 (emphasis added).

The Court did not hold in *Falcon* that any factual difference between the claims of the named plaintiffs and the claims of other members of the class defeats typicality. As one of the leading commentators has stated, "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." 1 H. Newberg, *Newberg on Class Actions* § 3.15 at 168 (2d ed. 1985).

In *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 123 (3d Cir. 1985), *aff'd on other grounds*, ___ U.S. ___, 107 S. Ct. 2617 (1987), a case decided after *Falcon*, we held that the claims of plaintiffs that racial bias occurring after their probationary period had ended led to their discharge were sufficiently typical of the claims of class members of racial bias during their probationary period to satisfy Rule 23(a). We specifically rejected the contention that the typicality requirement was not met because "in a number of areas the class representatives' specific allegations are distinct from those of the class as a whole." *Id.* Although the named plaintiffs in this case do not share all of the claims of the class, since the various claims alleged appear to stem from a single course of conduct by which the Unions allegedly failed to represent their members fairly and effectively, we cannot conclude that the district court abused its discretion in holding that

the typicality requirement was met.[8] The case will be remanded for further proceedings on the adequacy of representation issue.[9]

IV.

Statute of Limitations

The district court granted summary judgment on all claims which were not "waived" by the individual plaintiffs on the ground that they were time barred. Plaintiffs contend that the district court erred in holding that the six-month statute of limitations of section 10(b) of the NLRA, 29 U.S.C. § 160(b) is the limitations period applicable to their claims. They argue that because their claims are for breach of the Unions' obligations under their respective constitutions[10], the Pennsylvania four-year statute of

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8. The Unions argue that the named plaintiffs do not have standing to raise the claims of the class. Appellees' Brief at 44-46. They confuse standing and the typicality requirement of Rule 23(a)(3). Each of the named plaintiffs has presented claims of injury to herself and has alleged facts which present a case or controversy. *See* Goodman v. Lukens Steel Co., 777 F.2d at 122.

9. On remand it will be necessary for the district court to determine whether the named plaintiffs' claims "exist[ed] during the applicable limitations period" and whether the possibility of intervention by other qualified class representatives would be appropriate. *See* Goodman v. Lukens Steel Co., 777 F.2d at 124.

10. Plaintiffs point to several provisions of the Unions' constitutions in support of their contention that the Unions' actions are properly characterized as a breach of the Unions' constitutions. They argue that Art. VII, § 1 of the ACTWU constitution provides that "the membership shall be organized into local unions and/or joint boards," that the members of every local are required to delegate the exercise of their rights under section 7 of the NLRA, 29 U.S.C. § 157 and Art. VII § 4 of the ACTWU constitution to the Joint Board, that the Joint Board had the sole authority to execute collective bargaining agreements with Downs under Art. VI, § 3 of the Joint Board's constitution, that under Art.

limitations for breach of contract, 42 Pa. Cons. Stat. Ann. § 5525(8) (Supp. 1987), rather than section 10(b) of the NLRA is the applicable limitations period. It appears that plaintiffs' counsel repudiated the allegations of a breach of the duty of fair representation made in the complaint in the attempt to take advantage of what he assumed would be the longer statute of limitations applicable to claims of violation of the Unions' constitutions.

We recently held in *Lewis v. International Bhd. of Teamsters*, No. 86-1644, slip op. at 16-17 (August 21, 1987), that the six-month limitations period of section 10(b) was applicable to a section 301 claim that a local union's failure to conduct a secret ballot vote on a supplemental agreement with the employer was a violation of the international union's constitution. We based our holding on the analysis applied in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983), where the Court held that the "family resemblance" between an unfair labor practice charge under the NLRA and a breach of the duty of fair representation claim brought by an employee against a union required application of the six-month limitations period of section 10(b) to "hybrid" section 301 suits against the employer for breach of the collective bargaining agreement and the union for breach of the duty of fair representation. We concluded that Lewis' claim bore a similar "family resemblance" to an unfair labor practice. *Id.* at 15; *see also Local Union 1397, United Steelworkers of America v. United*

VI, § 4 of the Joint Board's constitution only the Joint Board can call or conduct a strike, that under Art. III, § 8 of Local 80's constitution and Art. VII, § 3(a) of the ACTWU constitution the Joint Board was obligated to organize Local 80, and that the financing of ACTWU, the Joint Board and Local 80 required dues rebates of $.15 and $.25 per month to Local 80 and the shop association respectively.

Steelworkers of America, 748 F.2d 180, 183 (3d Cir. 1984). We also found it significant that Lewis' action, if successful, could alter the terms of the bargaining agreement and therefore application of the four-year state limitations period for breach of contracts would impinge upon the policy of speedy resolution of labor disputes. *Lewis*, No. 86-1644, slip op. at 17; *see also DelCostello*, 462 U.S. at 168-69.

The same concerns lead us to conclude that the six-month statute of limitations is applicable to most of plaintiffs' allegations of breaches of the Unions' constitutions. The material allegations in support of these claims are that the Unions fraudulently engineered the strike vote; that the Unions failed to pursue grievances of second-shift employees and terminated workers; that they failed to protest an increase in medical deductions by Downs; and that the Unions allowed Local 80 to "fall into chaos" and failed to conduct elections. App. at 10-11. Each of these claims implicates the policy considerations that led the Court to adopt the six-month limitations period in *DelCostello* because they are related to the Unions' role as exclusive bargaining representatives for Local 80's members. While plaintiffs may choose to characterize these claims as arising from a breach of the Unions' constitutions, the acts on which the claims are based are not dissimilar, indeed are identical, to acts which would support a claim for violation of the Unions' duty of fair representation. The latter would be subject to a six-month statute of limitations. It would be anomalous were we to conclude that a claim for essentially the same acts was governed by two different limitations periods depending on the name the party chooses to give the claim. *See Erkins v. United Steelworkers of America*, 723 F.2d 837, 840 (11th Cir.), *cert. denied*, 467 U.S. 1243 (1984).

The rationale for applying a six-month statute of

limitations to, for example, the claim based on fraudulent ratification of the strike vote is evident since a longer period could be disruptive to the entire relationship between the company and the union. *Lewis*, No. 86-1644, slip op. at 17; *see also DelCostello*, 462 U.S. at 169. Thus, we agree with the district court that the six-month limitations period of section 10(b) is applicable to Count I of the complaint.

The district court did not reach the issue of the statute of limitations applicable to the claims in Count II that the Unions improperly double-deducted dues when disabled employees returned to work and that the Unions failed to rebate the $.25 per employee allocable to the shop association.[11] The district court treated those claims as "waived". They were "waived" only to the extent that the individual plaintiffs informed the court after denial of class certification that they could not in good faith prosecute those claims on an individual basis because they were claims accruing to the entire class. Since we are remanding for reconsideration of the class certification, we must consider which statute of limitations is applicable to those Count II claims.

In *Lewis*, we suggested that the limitations period from a source other than section 10(b) might be more appropriate to some claims of a breach of a union constitution. *Lewis*, No. 86-1644, slip op. at 17 (citing *DelCostello*, 462 U.S. at 171-72); *see also International Union, United Automobile Workers of*

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11. The complaint alleges a failure to rebate dues to Local 80 as well. The briefs in this court focus only on the failure to rebate to the shop association. Because we are remanding this case to the district court, the district court will be in a position to clarify the relationship between Local 80 and the shop association and to rule on whether the claim for failure to rebate may be maintained by these plaintiffs without joining Local 80 or the shop association as plaintiffs.

America v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) (applying six-year state contracts statute of limitations to claim by union brought on behalf of employees against employer for failure to pay vacation pay due employees under collective bargaining agreement). Where there is little similarity between a breach of union constitution claim and an unfair labor practice claim, there is no basis for borrowing section 10(b) as the applicable statute of limitations. We must consider therefore whether plaintiffs' claims of double dues deduction and failure to rebate to the shop association warrant application of the longer Pennsylvania breach of contract limitations period.

In *Adams v. Gould Inc.*, 739 F.2d 858 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985), we were required to decide which statute of limitations to apply in an action by former employees against their employer for underfunding their pension trust, an underfunding that arose from a settlement between the employer and the union in implementing an arbitration award. We held that the three-year limitations period of 29 U.S.C. § 1113(a)(2) for ERISA violations was the appropriate limitations period rather than the six-month section 10(b) period. We distinguished the concerns in that case from those in the ordinary breach of duty of fair representation case in which speed and finality in the resolution of disputes are critical because the issue is normally intertwined with the day-to-day relationship between management and labor. We stated:

> In [a] pension dispute . . . that policy is less relevant. Even where the litigated dispute involves the funding of a pension plan involving an entity that remains in business, rather than an entity which ceases operation . . . . the immediate effect of the dispute on the day-to-day labor-management relationship is slight.

739 F.2d at 867.

The claims in this case that the Unions violated their constitutions by the double dues deduction and failure to rebate dues to the shop association have little or no relation to the day-to-day relationship between Local 80 and its members, on one hand, and Downs, on the other. The need for speedy resolution of the dispute is therefore not present. Accordingly, we hold that the statute of limitations applicable to Count II is the four-year Pennsylvania statute for breach of contract.

The double deduction of dues and rebate claims set forth in Count II as a violation of the Unions' constitutions also form the basis of the RICO claim asserted in Count IV. The RICO claim is also covered by a four-year statute of limitations, *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, ___ U.S. ___, 107 S. Ct. 2759 (1987).

The district court also apparently treated as waived plaintiffs' LMRDA claim in Count III that the Unions failed and refused to provide members of the class with copies of the bargaining agreement and the Unions' respective constitutions. The reasoning that we used in *Local 1397, United Steelworkers of America*, 748 F.2d at 183, to apply a six-month statute of limitations to the LMRDA claim asserted there is applicable as well here.

V.

Tolling

In applying the six-month statute of limitations, the district court concluded that all of the remaining claims of the individuals were time barred.[12] Plaintiffs

12. For example, it held that the claim concerning the strike was time barred because the strike occurred two and one-half years before the action was brought and that the claim with respect to

contend that the district court erred by failing to determine whether their attempts to exhaust internal union remedies tolled the running of the statute.

In *Scott v. Local 863, International Bhd. of Teamsters*, 725 F.2d 226, 229 (3d Cir. 1984), we held that the statute of limitations does not begin to run in a section 301(a) suit until "the futility of further union appeals became apparent or should have become apparent." *See also Lewis*, No. 86-1644, slip op. at 19-20. This requires a claim-by-claim determination.

Plaintiffs argue that they and other members of the proposed class made numerous efforts through letters, telephone calls and petitions to complain about their grievances to the Joint Board. Bruce Dunton, the Regional Director of the Joint Board, acknowledged receipt of complaints about at least some of the matters that are the subject of this suit. Dunton also testified concerning a letter and petition dated April 10, 1985 signed by members of the Downs' shop association seeking an audit of Local 80's books and payment of the rebates. App. at 577-79; *see also* App. at 763-64.

There is ample evidence that plaintiffs were making an ongoing effort to resolve Local 80's problems internally. We cannot decide as a matter of law when, if ever, it should have become apparent that further efforts would have been futile. Plaintiffs assert that the class sought and received the Unions' assurances that the conduct complained of would be rectified as late as five months prior to the filing of the complaint on October 2, 1985. On remand, the district court will have to consider which, if any, of the claims covered by the six-month statute of limitations were

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processing grievances of second-shift employees was barred because Grasty, the only second-shift employee among the named plaintiffs, had not filed a grievance within six months of filing the complaint. App. at 246-47.

tolled by efforts at internal resolution. The district court should consider whether plaintiffs' informal complaints are to be treated as comparable to utilization of an existing mechanism for complaining about union actions. The district court will also have the opportunity to consider whether the tolling issue is affected by its determination of the class certification issue.[13]

VI.

Conclusion

For the foregoing reasons, we will vacate the district court's order denying class certification and remand for further proceedings consistent with this opinion. Costs on appeal are to be divided equally between appellants and appellees.

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13. In light of our disposition, we do not reach plaintiffs' claim that the district court was arbitrary, unreasonable and prejudicial in its scheduling and case management, particularly in the order denying the motion for enlargement of time and setting the pretrial schedule.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROSE GRASTY, et al.	:	Civil Action
	:	
v.	:	
	:	
AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, et al.	:	No. 85-5654

MEMORANDUM

Newcomer, J. August 9, 1986.

In this case, plaintiff sought damages as representatives of the class of members of Local 80, Amalgamated Clothing and Textile Workers Union (ACTWU"), against Local 80, the Mid-Atlantic Regional Joint Board of the ACTWU, and against the ACTWU itself. On May 30, 1986, by Memorandum and Order I denied plaintiffs' motion for class certification. On June 2, 1986, the day scheduled for commencement of trial, plaintiffs responded to defendants' motion for summary judgment. Based on plaintiffs' responsive memorandum, I indicated that I would grant defendants' motion in certain respects, and deny it in others. In open court, plaintiffs indicated that all remaining factual allegations of misconduct did not apply to their individual claims, absent the possibility of class recovery. They therefore waived those allegations as to themselves. On July 31, 1986, I issued an Order granting defendants' motion for summary judgment. I now file this memorandum explaining the basis for the disposition of defendants' motion.

While this lawsuit initially presented a variety of legal claims, its factual basis lay in the alleged failure of the Union at the various levels to discharge its obligations to represent the interests of the members of Local 80. Among plaintiffs claims were misappropriation of

funds, fraud causing the premature termination of a strike in 1983 and failure to process certain grievances. Complaint at ¶¶18-22. The legal basis of the individual plaintiffs' claims was breach of the defendants' duty of fair representation pursuant to section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185. Complaint at ¶¶26-28 (Count I).[1]

Defendants assert several bases for the entry of summary judgment in their memorandum of law accompanying the motion. I need only address the statute of limitations. All claims not waived by the individual plaintiffs, which the plaintiffs claim to have affected them personally, are barred by the statute of limitations.

In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court applied the six month statute of limitations contained in Section 10(b) of the NLRA, 29 U.S.C. §160(b), to "hybrid actions," in which an employee sues both his employer for breach of a collective bargaining agreement, and his union for violating its duty of fair representation.

The Supreme Court noted in *DelCostello* that section 301 does not expressly set forth a statute of limitations. The Court referred to the fact that section 301 suits often involve separate, albeit interdependent claims — one for breach of contract by the employer and one for breach of the duty of fair representation by the union. In deciding that the six month statute of limitations and not a state law breach of contract limitation should apply to such a suit, the Court stated that the NLRB has consistently held that breaches of the duty of

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1. Upon denial of the motion for class certification, plaintiffs waived their claims under Counts II through V, which were legal claims based on the same underlying factual allegations, as applicable only to class relief. Plaintiffs waived ¶¶21(2) and 21(3) for the identical reason. Plaintiffs also waived ¶¶23-24 as conclusory only, providing no basis for recovery independent of the other factual allegations.

fair representation are unfair labor practices. While declining to address the correctness of the NLRB's view, the court said that there is an undeniable "family resemblance" between a breach of the duty and an unfair labor practice, since both claims involve allegations of unfair, arbitrary or discriminatory treatment of workers by unions. 462 U.S. at 170-171. Thus, the court applied the six month statute of limitations under Section 10(b) of the National Labor Relations Act to such suits.

In so ruling, the Court noted that, "even if [that] action were considered as arising solely under §301. . . , the objection to the use of state law and the availability of a well-suited limitations period in §10(b) would call for application of the latter rule." *Id.* at 158 n. 12. This is true despite the fact that the state contract law limitations period continues to apply to section 301 suits by unions brought only against an employer for breach of a collective bargaining agreement. *Id.* at 162-63, citing *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). The Supreme Court considered significant the fact that *DelCostello* was brought by an individual, dependent on the good offices of his union in pursuing grievances, rather than by a union against the employer.

In the case before me, plaintiffs' complaint in Count I alleges that the defendants breached their duty of fair representation. Plaintiffs have not alleged any breach of the collective bargaining agreement by the employer, Downs Carpet. Thus, the instant action is not a hybrid action, and not strictly within the rule of *DelCostello*. But I conclude that, under *DelCostello* and other applicable precedent, the same 6 month statute of limitations applies to this case as well.

In *Erkins v. United Steelworkers of America*, 723 F.2d 837 (11th Cir. 1984), the plaintiffs argued that the Supreme Court's decision in *DelCostello* only applied to hybrid actions against both an employer and the union. The Eleventh Circuit rejected such an approach, stating

that the similarity of rights asserted and the policy considerations set out in *DelCostello* are even more clear when a plaintiff brings only a breach of the duty suit against the union. *Id.* at 838. The Supreme Court in *DelCostello* had determined that a breach of the duty of fair representation is either an unfair labor practice under the National Labor Relations Act, or very closely related thereto. As such, the *Erkins* court found ample justification for holding that *DelCostello* should be applied, regardless of whether or not a hybrid action was involved.

The holding of the *Erkins* court was followed by the Sixth Circuit in *Adkins v. I.U.E.*, 769 F.2d 330, 335 (6th Cir. 1985). There, the court held that the six month statute of limitations in Section 10(b) applies to all unfair representation claims against a union, regardless of the presence of a Section 301 breach of contract claim against the employer.

The Third Circuit Court of Appeals has not directly addressed the question whether the six month limitations contained in section 10(b) applies to a non-hybrid claim of unfair representation brought by employees against their union. But the Court of Appeals has taken up related issues, and applied the conclusion of *DelCostello* to those cases. In *Taylor v. Ford Motor Co.*, 761 F.2d 931, 932 (3d Cir. 1985) the Court construed *DelCostello* "as mandating application of the six month limitations period to all section 301 actions that are predicated upon a union's breach of its duty of fair representation, and implicate no countervailing federal policy."

In *Local Union 1297, United Steelworkers of America v. United Steelworkers of America*, 748 F.2d 180 (3d Cir. 1984), the Third Circuit applied the six month statute of limitations to a non-hybrid action brought under section 102 of the Labor Management Relations and Disclosure Act ("LMRDA"), 29 U.S.C. §412. That action involved alleged retaliation against certain union

members and disciplinary action imposed by the union. In so ruling, the Court relied on the "family resemblance" of the LMRDA claim to unfair labor practice charges, *id.* at 183, just as the *DelCostello* court analogized breach of duty of fair representation claims to unfair labor practice charges.

I believe that the "family resemblance" of claims for breach of the duty of fair representation by a union and unfair labor practices does not depend on the presence of a second claim against the employer. If anything, taking the lawsuit as a whole, an action by an employee against a union for breach of its duty of fair representation, without a breach of contract claim against the employer, bears an even greater resemblance to an unfair labor practice charge. An ordinary suit against the employer for breach of a collective bargaining agreement calls for application of the state contract law limitations period. *Hoosier Cardinal Corp., supra.* An employee's action against the union without such a suit against the employer is not required to overcome the policy difference which led the Court to adopt the contract limitations period in cases against the employer instead of the 6 month period under Section 10(b). It therefore calls for the 6 month limitation even more clearly than does a hybrid action such as *DelCostello.* Because the instant action lies solely against the union for breach of its duty of fair representation, and not against the employer, I conclude that the 6 month limitation period applies.

Turning to the specific allegations in the complaint which involve the plaintiffs personally, I find that an action for breach of duty of fair representation is time-barred. Paragraphs 18-19 of the complaint allege wrongs by the union arising from a strike which occurred two and one half years before the complaint was filed, and are therefore time-barred. Paragraph 20(a) pertains to grievances of second shift employees. The only individual plaintiff who is a second shift employee is Ms. Rose

Grasty. Ms. Grasty has not shown that she filed any grievances within 6 months of the filing of this complaint. The plaintiffs lack standing to sue based on paragraph 20(b), which asserts the failure of defendants to pursue grievances on behalf of discharged employees, as none of the plaintiffs was discharged. The claim relating to a temporary increase in union dues in 1984, presented in ¶20(c), is similarly precluded by the statute of limitations. And finally, ¶21(l) is also barred by the 6 month limitation period. That allegation relates to instances in which disabled members of local 80 were charged dues for a period during which they were disabled. Because the individual plaintiffs have neither averred nor submitted proof that they were disabled during the six-month period prior to filing the lawsuit, that charge is barred as well.

In sum, all of the individual claims applicable to the plaintiffs are barred by the statute of limitations. For this reason, summary judgment was entered in favor of the defendants.

Clarence C. Newcomer, *J.*

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROSE GRASTY, *et al.*,
Petitioners,
v.
AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, *et al.*,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1987

No. 87-748

ROSE GRASTY, *et al.*,

Petitioners,

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Respondents.

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BRIEF IN OPPOSITION

The opinions below, basis for invoking this Court's jurisdiction, and statutory provisions involved in this case are correctly set forth in the Petition for a Writ of Certiorari at pp. 1-2 and we therefore do not repeat those matters here as well.

COUNTERSTATEMENT OF THE CASE

The statement of the case in the petition is incomplete and as a result creates a misleading impression of the facts of this case. For that reason, we begin with a full counterstatement of the proceedings to this point.

This case was commenced by a group of employees of Downs Carpet Company ("Downs" or "the Employer") who were dissatisfied with the representation they had

received from their bargaining representative, the respondents Amalgamated Clothing and Textile Workers Union ("ACTWU") and its Mid-Atlantic Regional Joint Board (collectively, "the Unions"). "The gravaman of the complaint," as plaintiffs advised the district court, "is that defendants failed to represent plaintiffs fairly or properly in their collective bargaining and employment relationship with Downs." [1]

In particular, plaintiffs' complaint—the allegations of which must be assumed to be true for purposes of this proceeding—alleges that in February, 1983 the Union fraudulently engineered the ratification of a new collective bargaining agreement with the Employer, Complaint ¶¶ 18, 19, and that the Unions thereafter "failed and refused to provide plaintiffs and the class with effective representation in their day to day relationship with their employer" by failing to press employee grievances—particularly discharge grievances—and by failing to protest the Employer's increase in the payroll deduction for medical insurance, *id.*, ¶ 20. The complaint further alleges that the Unions had: "allowed the organization of [ACTWU] Local 80," the Local to which plaintiffs belong, "to fall into chaos"; wrongfully caused the deduction of certain dues from some plaintiffs' pay; failed to rebate monies to Local 80 to which the Local was entitled; and failed to provide plaintiffs with copies of the collective bargaining agreement between the Union and the Employer. *Id.* ¶¶ 21-23. After reciting these "material allegations," plaintiffs' complaint contained five counts each of which stated a different legal theory for attacking some or all of the Unions' conduct as set out in those allegations.

The sole issue raised by plaintiffs' certiorari petition concerns the ruling below with respect to the statute of limitations applicable to the claim stated in Count I of plaintiffs' complaint. The Count alleges that by virtue

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[1] Memorandum in Support of Motion for Class Certification at 2.

of the aforesaid conduct, the Unions "breach[ed]" the "duty of fair representation [owed to plaintiffs'] pursuant to the [Collective Bargaining] Agreement, its predecessor collective bargaining agreements and defendants' respective constitution and by-laws." Complaint, ¶¶ 27, 28.

The district court held that, under this Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), Count I of plaintiffs' complaint is subject to the six-month statute of limitations contained in § 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). ("NLRA"). Having earlier denied plaintiffs' motion for class certification, and finding that all of the individual plaintiffs' claims were Count I claims which had accrued more than six months prior to the commencement of this action, the district court dismissed plaintiffs' lawsuit. *See* Pet. App. A-23 to A-28.

On appeal, the United States Court of Appeals for the Third Circuit (per Sloviter, Becker, and Garth, J.J.) affirmed in part and reversed in part. That court affirmed the district court's ruling that § 10(b) states the applicable limitations period for Count I of plaintiff's complaint, although the court also ruled that the district court had "erred by failing to determine whether [plaintiffs'] attempt to exhaust internal union remedies tolled the running of the statute." Pet. App. A-21. The court of appeals also overturned the district court's class action ruling and reinstated those counts of the complaint which alleged "claims accruing to the entire class." Pet. App. A-18 to A-20. Based on these rulings, the appellate court "remand[ed]" the case "for further proceedings consistent with [its] opinion." Pet. App. A-22.

Notwithstanding the interlocutory nature of this proceeding, plaintiffs urge the Court to issue a writ of certiorari to enable the Court to review the lower court's holding that § 10(b) states the limitations period for Count I of the complaint here.

REASONS FOR DENYING THE WRIT

The court of appeals' holding that Count I of plaintiffs' complaint is governed by § 10(b) represents no more than an application of the principles established by this court in *DelCostello*, *supra*, to the particular factual allegations here. Those allegations are, moreover, analytically indistinguishable from those in *DelCostello* itself. The decision below is not in conflict with that of any other court of appeals. Accordingly, that decision is not worthy of this Court's plenary consideration.

A. In *DelCostello*, this Court held that § 10(b) states the appropriate limitations period for a "hybrid § 301/fair representation claim," 463 U.S. at 165, *viz.*, "a claim [under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185] that the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings," *id.* at 154. In reaching that conclusion the Court proceeded as follows.

The Court began by reviewing the general principles that are to be followed in establishing limitations periods for federal claims for which Congress has not enacted an express statute of limitations. While noting that in such cases the courts ordinarily "borrow . . . the most closely analagous statute of limitations under state law," *id.* at 158, the Court went on to state that . . . "where a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule significantly more appropriate vehicle for interstital lawmaking, we have not hesitated to turn away from state law" to select an appropriate limitations period. *Id.* at 172.

The Court in *DelCostello* then held that "hybrid" § 301/fair representation claims fall within this latter

rule.[2] The Court reasoned that the hybrid action "has no close analogy in ordinary state laws," *id.* at 165, and that application of a long state-law limitations period would preclude the relatively rapid resolution of labor laws favored by federal law," *id.* at 168. In contrast, the Court found that § 10(b) provides a "federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels." *Id.* at 169. The Court noted both the "family resemblance [which] is undeniable" between hybrid claims and unfair labor practice claims to which § 10(b) applies in terms, and also "the close similarity of the considerations relevant to the choice of a limitations period." *Id.* at 170-71. The Court explained:

> "In § 10(b) of the NLRA Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining-agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote —the formation of the . . . agreement and the private settlement of disputes under it.' Accordingly, '[t]he need for uniformity' among procedures fol-

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[2] The Court in *DelCostello* made clear that § 10(b) applies to a hybrid claim regardless of whether the plaintiff sues only the employer, only the union, or both parties because "the case [the plaintiff] must prove is the same whether he sues one, the other, or both." 462 U.S. at 165. Thus, the fact that this case was brought only against the Unions is of no legal significance in determining the applicability of § 10(b).

> lowed for similar claims, as well as the clear congressional indication of the proper balance between the interests at stake, counsel the adoption of § 10 (b) of the NLRA as the appropriate limitations period for lawsuits such as this." [*Id.* at 171]

B. The court of appeals in this case simply applied the holding and analysis of *DelCostello* to the particular factual allegations before it. That court first noted that Count I of plaintiffs' complaint in terms alleges a breach of the statutory duty of fair representation but that plaintiffs' counsel had "repudiated the allegations of a breach of the duty of fair representation made in the complaint to take advantage of what he assumed would be the longer statute of limitations applicable to claims of violation of the Unions' constitutions." A-16. Accepting that gambit as legitimate and viewing Count I as alleging a breach of a representational duty derived solely from the Unions' constitutions, the court of appeals held § 10(b) nonetheless controlling. That court reasoned:

> The material allegations in support of these claims are that the Unions fraudulently engineered the strike vote; that the Unions failed to pursue grievances of second-shift employees and terminated workers; that they failed to protest an increase in medical deductions by Downs; and that the Unions allowed Local 80 to "fall into chaos" and failed to conduct elections. App. at 10-11. Each of these claims implicates the policy considerations that led the Court to adopt the six-month limitations period in *DelCostello* because they are related to the Unions' role as exclusive bargaining representatives for Local 80's members. *While plaintiffs may choose to characterize these claims as arising from a breach of the Union's constitutions, the acts on which the claims are based are not dissimilar, indeed are identical, to acts which would support a claim for violation of the Unions' duty of fair representation.* The latter would be subject to a six-month statute of limitations. It would be anomalous were we to conclude that a claim for essentially the same acts was governed by two dif-

> ferent limitations periods depending on the name the party chooses to give the claim. [Pet. App. A-17 emphasis added]

In thus applying the *DelCostello* analysis to the specific factual allegations of Count I of the complaint, the court of appeals announced no sweeping general rule; rather that court simply made a fact-specific judgment that regardless of the *source* of the legal duty on which plaintiffs relied in Count I, the *substance* of the wrong alleged in Count I "implicates the policy considerations" that were controlling in *DelCostello*. At the same time the court below held that *other* allegations of petitioners' complaint—including the claim in Count II that the Unions had breached their constitutions by allegedly wrongfully deducting dues from disabled members and failing to make certain rebates to Local 80—were subject to Pennsylvania's four-year statute of limitations for contract actions and not the § 10(b) limitations period. The Court explained that those claims had "little or no relation to the day-to-day relationship between Local 80 and its members, on the one hand, and Downs, on the other," and "[t]he need for speedy resolution of the dispute is therefore not present." A-20. Plaintiffs are thus simply wrong in contending that the court below has applied *DelCostello* "indiscriminately," Pet. at 7, or in a manner that would "apply to virtually every Section 301 suit," *id.* at 8.[3]

C. Plaintiffs argue that the holding below "misreads and misapplies" *DelCostello*. Pet. at 7. Even if that were true, this case still would not merit review by the

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[3] *See also Adams v. Gould*, 739 F.2d 858 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985), in which the Third Circuit rejected the application of *DelCostello* to an action by former employees against their employer for the underfunding of their pension plan. In that pension dispute, the court held, "the immediate effect of the dispute on the day-to-day labor management relationship is slight," and a longer limitations period is appropriate. *Id.* at 867, *quoted* at A-19.

Court, for as we have just seen, the decision below, whether right or wrong, is a narrow and fact-specific ruling. In any event, as we now show, plaintiffs' attacks on the decision below are wholly without merit.

1. Plaintiffs first seek to distinguish *DelCostello* on the ground that "this case is not a hybrid suit; it does not challenge a grievance procedure." Pet. at 7-8. But plaintiffs' suggestion that the allegations here were not related to the Unions' handling of grievances is disingenuous. As we have seen, the factual allegation in which Count I rests were largely concerned with grievance handling: the complaint challenged the Unions' asserted failure to file and press grievances, and the Union's failure to protest, presumably through the grievance process, the Employers' increase in medical insurance deductions.

The significant remaining allegation underlying Count I—the allegation that the collective bargaining argument itself was fraudulently ratified—far from providing grounds for distinguishing *DelCostello* calls even more clearly for application of the § 10(b) limitations period. That allegation places into question not merely the resolution of a particular grievance but rather the validity of the entire contract, and thus the need for a "speedy resolution" is even more compelling than in a "hybrid" case.

That being so, *DelCostello*, not surprisingly, makes plain that its reasoning applies to *all* suits which "implicate[] 'those consensual processes that federal labor law is chiefly designed to promote—the *formation of collective bargaining agreements* and the private settlement of disputes under it." 462 U.S. at 163; emphasis added. Indeed, it was in a case involving a challenge to the validity of a collective bargaining agreement that this Court first stressed the need for the prompt resolution of labor disputes in order "to stabilize existing bargaining relationships." *Machinists Local v. Labor Board*, 362 U.S. 411, 419

(1960). And every court of appeals that has considered the limitations issue has concluded that *DelCostello* controls in fair representation suits not concerned exclusively with grievance representation, including suits challenging a union's actions in negotiating a collective bargaining agreement.[4]

2. Plaintiffs alternatively argue that because § 301 was enacted to assure that unions are " 'legally accountable for agreements into which they enter[],' " it would be "anomalous to subject the right [to sue to enforce such agreements] to the six-month statute of limitations contained in Section 10(b) as opposed to the forum state statute of limitations for contract claims." Pet. at 5-6.[5] But as we have seen, the court below did *not* hold § 10(b) applicable to § 301 suits generally or to all § 301 suits seeking to enforce union constitutions; indeed the court below *refused* to apply § 10(b) to Count II of plaintiffs'

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[4] *See, Conley v. IBEW Local 639*, 810 F.2d 913 (9th Cir. 1987) (discriminatory hiring hall procedures); *Eatz v. IBEW*, 794 F.2d 29, 33 (2d Cir. 1986) (negotiation of discriminatory contract provisions); *Rodman v. Hensley*, 740 F.2d 665, 666-667 (8th Cir. 1984); *cert. denied*, 471 U.S. 1016 (discrimination in union hiring hall); *Erkins v. Steelworkers*, 723 F.2d 837 (11th Cir. 1984), *cert. denied*, 467 U.S. 1243 (union misconduct during strike, including failure to negotiate reasonable successor collective bargaining agreement).

[5] Plaintiffs' argument in this regard necessarily presupposes that a claim by individual upon members against a union for breach of a union's constitution states a federal cause of action under § 301. This Court expressly left that question open in *Plumbers & Pipefitters v. Plumbers & Pipefitters*, 452 U.S. 615, 627 n.16 (1981).

That neither party in this Court takes issue with the lower court's affirmative answer to that question provides yet another reason why plenary review of this case is inappropriate. If the Court were to grant review here, the Court would either have to assume *arguendo* the existence of a federal cause of action in order to reach the limitations issue or, alternatively, the Court would have to decide the questions left open in *Plumbers & Pipefitters* without the benefit of an adversary presentation.

complaint which alleges certain violations of the Unions' constitutions. All that the appellate court held is that Count I of the complaint in this case—which seeks to imply from the Unions' constitutions a contractual duty of fair representation and hold the Unions liable for breaching that duty—is governed by § 10(b).

There is nothing the least bit anomalous in that holding. Rather, what "would be anomalous," as the court below stated, would be "to conclude that a claim for essentially the same acts was governed by two different limitations periods depending on the name the party chooses to give the claim." Pet. App. A-17. Virtually every union constitution contains the kind of general provisions upon which plaintiffs here rely: provisions which do nothing more than establish the Unions' basic structure and allocate tasks to the International and its affiliated intermediate and local bodies.[6] Thus, virtually every union constitution could equally support

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[6] The court of appeals catalogued the alleged breaches of the Union constitutions as follows:

> Plaintiffs point to several provisions of the Unions' constitutions in support of their contention that the Unions' actions are properly characterized as a breach of the Unions' constitutions. They argue that Art. VII § 1 of the ACTWU constitution provides that "the membership shall be organized into local unions and/or joint boards," that the members of every local are required to delegate the exercise of their rights under Section 7 of the NLRA, 29 U.S.C. § 157 and Art. VII § 4 of the ACTWU constitution to the Joint Board, and that the Joint Board had the sole authority to execute collective bargaining agreements with Downs under Art. VII § 3 of the Joint Board's constitution, that under Art. VII, § 4 of the Joint Board's constitution only the Joint Board can call or conduct a strike, that under Art. III. § 8 of Local 80's constitution and Art. VII § 3(a) of the ACTWU constitution the Joint Board was obligated to organize Local 80, and that the financing of ACTWU, the Joint Board and Local 80 required dues rebates of $.15 and $.25 per month to Local 80 and the shop association respectively. [Pet. App. at A-15 to A-16 n.10]

a "breach of contract" claim of the type plaintiffs here advance. If § 10(b) did not apply to such claims, the door would be open to wholesale evasion of the time limits established by *DelCostello* through nothing more than artful pleading. *See also Erkins v. Steelworkers, supra*, 723 F.2d at 839-40; *Lewis v. International Brotherhood of Teamsters*, 826 F.2d 1310 (3d Cir. 1987.)

D. Contrary to plaintiffs' assertion, the court of appeals' measured application of *DelCostello* is not in conflict with the decision of any other court of appeals. None of the cases plaintiffs cite in which appellate courts declined to apply § 10(b) to various types of labor law claims bears any resemblance to the case at hand.[7] None involved an individual's claim against a union based on *either* the duty of fair representation *or* the union's constitution. Accordingly, those cases provide no warrant for the Court to review the instant case.

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[7] *See Derwin v. General Dynamics Corp.*, 719 F.2d 480 (1st Cir. 1983) (suit by a union against an employer to confirm an arbitration award); *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986) ("Bill of Rights" claim under LMRDA with no impact on the labor-management relationships or the resolution of disputes under the collective bargaining agreement); *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328 (6th Cir. 1985) (employer's suit to vacate arbitration award); *Southwest Areas Pension Fund v. Kraftco*, 799 F.2d 1098 (6th Cir. 1986) (pension dispute in which the Court relied on Third Circuit's decision in *Adams v. Gould, supra*, in rejecting application of *DelCostello*).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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